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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

HERNAN BOTERO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THIS COURT SHOULD REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT WHICH UPHELD THE RULING BY THE UNITED STATES DISTRICT COURT THAT THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT DOES NOT REQUIRE THE TRIAL COURT TO CONDUCT A SEPARATE INQUIRY INTO THE RELIABILITY OF OUT-OF-COURT STATEMENTS WHICH MEET THE REQUIREMENTS FOR ADMISSIBILITY OF RULE 801(d)(2)(E), WHERE THIS CONSTITUTES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND WHERE THIS DECISION IS IN CONFLICT WITH DECISIONS OF OTHER FEDERAL CIRCUIT COURTS OF APPEAL ON THE SAME MATTER?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, his family and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, HERNAN BOTERO, respectfully prays that a writ of certiorari issue to review the judgment, opinion and order on rehearing of the United States Court of Appeals for the Eleventh Circuit, entered in Case No. 85-6059 on December 16, 1986, and February 5, 1987, which affirmed the judgment of the United States District Court for the Southern District of Florida.

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit announced its opinion and judgment affirming the Petitioner's convictions and sentences for conspiracy to defraud the United States and to violate the laws regulating the filing of currency transaction reports, in violation of 18 U.S.C. §371, engaging in a scheme or device to falsify or cover up facts within the jurisdiction of the IRS, in violation of 18 U.S.C. §1001, and five counts of mail fraud, in violation of 18 U.S.C. §1341, in an unpublished opinion filed on December 16, 1986. That opinion, issued under Circuit Rule 25, is reproduced in the Appendix. (A.113). A petition for panel rehearing and for rehearing en banc was denied by the Court on February 5, 1987. This order is also reproduced in the Appendix. (A.114).

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. §1254(1). This petition is filed within the authorized time period following the Eleventh Circuit's order on rehearing. Sup.Ct.R. 20.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

Federal Rules of Evidence, Rule 801:

> The following definitions apply under this article:
>
> (a) Statement. A "statement" is (1) an oral or written assertion....
>
> (b) Declarant. A "declarant" is a person who makes the statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if --

* * *

> (ii) Admission by party opponent. The statement is offered against the party and is ... (E) the statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

Petitioner, HERNAN BOTERO, was charged with and tried for conspiracy to defraud the United States and to violate the laws regulating the filing of currency transaction reports, in violation of 18 U.S.C. §361 (Count 1), engaging in a scheme or device to falsify or cover up facts within the jurisdiction of the IRS, in violation of 18 U.S.C. §1001 (Count 2) and five counts of mail fraud, in violation of 18 U.S.C. §1341 (Counts 3-7). (A.1-26). He was convicted and sentenced on all seven counts.

The government's case against BOTERO was based upon the testimony of Alan Campbell and Gary Dodson, two former loan officers at the Landmark First National Bank of Ft. Lauderdale, who, despite being admitted perjurers, swindlers and thieves, had received, in

exchange for their testimony against BOTERO, virtually complete absolution for all their past misdeeds. These misdeeds included not only their involvement in the alleged money laundering scheme, but also the unrelated theft of millions of dollars from the Landmark Bank, through the approval of fraudulent loans, for which they received kickbacks, a computer fraud scheme, and other dishonest dealing with their employer.

According to Campbell and Dodson, they were approached in mid-October 1979 by Dolores Eirin, a bank officer who asked them if they would be interested in helping a client make large cash deposits without reporting the transactions. In mid-December 1979, Eirin introduced HERNAN BOTERO to Campbell and Dodson. BOTERO explained that he imported a Colombian "product" into the

United States and sold it for cash. BOTERO intended to deposit the cash into the Landmark Bank, from which it would be wired to Colombia, where it would be converted to pesos. BOTERO never discussed the nature of the "product" being brought into the United States.

In late December 1979, BOTERO opened five accounts using fictitious names that Eirin provided. While sitting at Eirin's desk, BOTERO made a telephone call to an unknown individual who assigned five passport numbers to be used as identification on the signature cards. Because of the use of El Salvador passport numbers, the bankers decided that the cover story for the deposits would be that the five individuals were citizens of San Salvador who were attempting to get their assets out of the country due to political unrest.

Campbell and Dodson stated that BOTERO introduced them to two couriers who would deliver money to the bank. Lasardo Restrepo was one of the couriers. Over a period of several months, couriers brought cash deposits to the bank in a variety of containers including suitcases, duffle bags, boxes, and paper bags. Eirin, Campbell and Dodson prepared CTR's for each deposit. They destroyed the original copy of each report, which should have been sent to the Internal Revenue Service, and placed a copy of each report in the bank's files, so that management would believe that the forms were filed. A record of these transactions was kept by Eirin and put in a stenographic notebook. Dodson destroyed the pad prior to his departure from the bank.

In January and February 1980, the majority of the cash was transferred by

wire to the Pan American Bank in Miami for credit to accounts in two Colombian banks, and to other banks or individuals. Because the wire transfers attracted the attention of Landmark's main office, in February of 1980, Eirin, Campbell and Dodson began transferring money with cashier's checks, mailed out by express mail.

In October 1980, federal bank examiners and Treasury special agents began doing an audit at the bank. Campbell then had a telephone conversation with HERNAN BOTERO, in which he told BOTERO that too many people were involved and it was time to stop the deposits. The deposits stopped at that time. Shortly thereafter, Campbell and Dodson resigned from the bank and, ultimately, entered into their agreements with the government.

The defense in this case was that BOTERO never had intended not to report the deposits to the United States government. The theory of defense was that the decision not to file the CTR's had been made by Eirin, Campbell and Dodson and was motivated by their desire to avoid drawing attention to the cash deposits. Such attention might have exposed the fact that they were, without the bank's knowledge or approval, charging BOTERO to process the cash (whereas BOTERO believed he was being charged a processing fee by the bank). The idea to destroy the original CTR's while placing copies in the bank's files was developed and implemented solely by Campbell, Dodson, and Eirin.

A critical part of the government's case was its claim that the money which was being "laundered" through the Landmark Bank constituted the proceeds

of drug transactions and its assertion that the Petitioner, HERNAN BOTERO, was involved personally in the smuggling of drugs into United States. This argument was made by the prosecution over the vigorous objection of the defense. The government could introduce no direct evidence to show that the Petitioner BOTERO was a drug smuggler. The only evidentiary basis for the government's assertion that BOTERO was involved in the smuggling of drugs was a single conversation which allegedly took place among coconspirators Losardo Restrepo, Campbell and Dodson in May of 1980.

According to Campbell and Dodson, Restrepo was one of the couriers who was bringing money into the bank for BOTERO. In addition, he was bringing in his own money, which he was putting into his own accounts, for which he was paying the bankers a one percent commission.

Restrepo had made it very clear that he did not want BOTERO knowing about these segregated monies and accounts. (A.35-36).

Campbell and Dodson testified that the amount of deposits had "dropped off" in May of 1980 and that on one occasion, when Restrepo came into the bank, they asked him what the problem was. Campbell and Dodson testified on direct examination that Restrepo had told them that the coast guard was out in force due to the Mariel Boatlift, that they were stopping drug boats and that one of BOTERO's boats had been seized. (A.28). On cross-examination, however, Campbell stated that Restrepo never said that the boat which was seized was a drug boat and that this simply was an assumption on his part.

The defense had vigorously objected to the introduction of the Restrepo

conversation on the ground that the statement, though made during the course of the conspiracy, was not in furtherance of the conspiracy and, therefore, did not meet the test of admissibility under Rule 801(d)(2)(E). (A.27-90).

Additionally, the defense argued that the statement was so inherently unreliable, particularly with respect to Restrepo's source of the information asserted in his statement, that its introduction violated BOTERO's Sixth Amendment right to confrontation and constituted the improper admission of hearsay within hearsay. (A.27-93). Defense counsel cited decisions from several circuits which have held that in order to satisfy the requirements of the confrontation clause, the government must demonstrate that an out-of-court statement of a non-testifying coconspirator bears sufficient indicia of

reliability, even where the requirements of Rule 801(d)(2)(E) have been met. E.g., United States v. Ammar, 714 F.2d 238 (3d Cir. 1983). Counsel argued that the trial judge should conduct such an inquiry in this case and that under the circumstances which existed at the time the statements were made, the statements did not bear sufficient indicia of reliability so as to warrant their admission. (A.27-93). The district court judge, relying upon the Fifth Circuit decision in United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), ruled that no separate reliability inquiry was necessary and admitted the statements into evidence. (A.89-91). These statements formed a critical portion of the government's case against BOTERO, who was convicted.

BOTERO appealed his convictions and sentences to the United States Court of

Appeals for the Eleventh Circuit, which had jurisdiction over the appeal pursuant to 28 U.S.C. §1291 and Rule 4 F.R.A.P. On appeal, BOTERO argued that the trial court erred in admitting the statements into evidence and that his rights under the Confrontation Clause of the Sixth Amendment had been violated by the trial judge's refusal to require the government to demonstrate that the statements possessed sufficient indicia of reliability. The circuit court affirmed Petitioner's convictions and sentences in an unpublished, per curiam decision issued pursuant to Circuit Rule 25. (A.113).

Following the issuance of the circuit court's decision, Petitioner filed a petition for rehearing and a petition for rehearing en banc. Petitioner explicitly requested the circuit court to grant rehearing en banc on the ques-

tion of whether the Confrontation Clause of the Sixth Amendment requires the trial court to conduct a separate inquiry into the reliability of out-of-court statements which meet the technical requirements for admissibility of Rule 801(d)(2)(E), but which otherwise lack indicia of reliability. On February 5, 1987, the circuit court denied the petition for rehearing and for rehearing en banc. (A.114).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT WHICH UPHELD THE RULING BY THE UNITED STATES DISTRICT COURT THAT THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT DOES NOT REQUIRE THE TRIAL COURT TO CONDUCT A SEPARATE INQUIRY INTO THE RELIABILITY OF OUT-OF-COURT STATEMENTS WHICH MEET THE REQUIREMENTS FOR ADMISSIBILITY OF RULE 801(d)(2)(E), WHERE THIS CONSTITUTES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND WHERE THIS DECISION IS IN CONFLICT WITH DECISIONS OF OTHER FEDERAL CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.

Petitioner is asking this Court to grant a writ of certiorari to resolve the question of whether the Confrontation Clause requires a showing of reliability as a condition to admission of the out-of-court statements of a non-testifying coconspirator, when those statements otherwise satisfy the requirements of Fed.R.Evid.801(d)(2)(E).

This important question of federal law was left unresolved by this Court's decision in United States v. Inadi, U.S. __, 106 S.Ct. 1121 (1986), and decisions rendered by the federal circuit courts of appeal continue to be in direct conflict. The case at bar, in which out-of-court declarations of a coconspirator, who was not present in court for cross-examination, were admitted into evidence without a showing of particularized indicia of reliability, pursuant to the de facto rule of admissibility followed by the Fifth and Eleventh Circuit Courts of Appeal, see United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), on reh'g, 686 F.2d 356, cert. denied, 464 U.S. 965 (1983); United States v. Wolfe, 766 F.2d 1525 (11th Cir. 1985), cert. denied, __ U.S. , 106 S.Ct. 1379 (1986); United States v. Caporale, 806 F.2d 1487 (11th Cir.

1986), provides the ideal opportunity to resolve the question and to promulgate a uniform rule to be followed by all the circuits.

The root of the conflict is this Court's decisions in Dutton v. Evans, 400 U.S. 74 (1970), and Ohio v. Roberts, 448 U.S. 56 (1980). In Dutton, this Court confronted the question of whether the admission of the out-of-court statements of a non-testifying coconspirator, pursuant to a Georgia statute which was broader than the federal rule because it permits the introduction of coconspirator statements made during the concealment phase of a conspiracy, violated the defendant's Sixth Amendment right to confrontation. This Court held that the admission of the statements did not implicate the defendant's right of confrontation. However, this holding was reached based not upon any de facto rule

of admissibility, but rather, upon a finding that the statements possessed sufficient particularized indicia of reliability. Four factors were identified by the Court in reaching its decision:

> The confrontation issue arises because the jury was being invited to infer that Williams had implicitly identified Evans as the perpetrator of the murder when he blamed Evans for his predicament. But we conclude that there was no denial of the right of confrontation as to this question of identity. First, the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving this statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection

> is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

Dutton v. Evans, supra, 400 U.S. at 88-89.

In Ohio v. Roberts, supra, the question before the Court was whether the introduction of the transcript of a witness's testimony at a preliminary hearing violated the Defendant's right of confrontation where the witness had not been cross-examined at the preliminary hearing and was unavailable at trial. In upholding the admissibility of the transcript, this Court held:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Ohio v. Roberts, supra, 448 U.S. at 66.

Subsequent to these decisions, a conflict has arisen among the various federal circuits with respect to whether or not a statement of a non-testifying coconspirator, which satisfies the requirements of Fed.R.Evid. 801(d)(2)(E), is admissible into evidence without a separate, particularized showing of reliability. In addition to the Fifth and Eleventh Circuits, cited above, the First, Sixth and Seventh Circuits all have concluded that a

declaration admitted under the coconspirator exemption automatically satisfies Sixth Amendment requirements. E.g., Ottomano v. United States, 468 F.2d 269 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973); Boone v. Marshal, 760 F.2d 117 (6th Cir. 1985); United States v. Molt, 772 F.2d 366 (7th Cir. 1985), cert. denied, _ U.S. _, 106 S.Ct. 1458 (1986). On the other hand, at least four circuits, the Second, Third, Eighth and Ninth, hold that even where a coconspirator statement is admissible under Rule 801(d)(2)(E), in order to satisfy the requirements of the Confrontation Clause, the government must demonstrate that the statement bears sufficient indicia of reliability, utilizing the criteria set forth in Dutton v. Evans, supra. See, e.g., United States v. Perez, 702 F.2d 33 (2d Cir. 1983), cert. denied, 462 U.S. 1108

(1983); United States Ammar, 714 F.2d 238 (3d Cir. 1983), cert. denied sub nom Stillman v. United States, 464 U.S. 936 (1983); United States v. DeLuna, 763 F.2d 897 (8th Cir. 1985), cert. denied, __ U.S. __, 106 S.Ct. 382 (1986); United States v. Ordonez, 722 F.2d 530 (9th Cir. 1983). In so holding, the Third Circuit Court of Appeals noted, in Ammar, that Rule 801(d)(2)(E) is not a firmly rooted hearsay exception, but rather, treats coconspirator statements as a category of party admissions under the legal fiction that each conspirator is an agent of the other. Because the basis for the admission of such a statement is different, the Ammar court concluded that there is no assumption that a coconspirator statement is per se trustworthy and, therefore, a Rule 801 inquiry cannot be viewed as necessarily equivalent to a Confrontation Clause

inquiry. Though the Ammar court observed that in many, if not most, instances, a coconspirator statement will be sufficiently reliable to satisfy the Confrontation Clause, the court mandated a separate inquiry utilizing the criteria set forth in Dutton v. Evans, supra. See United States v. Ammar, supra, 714 F.2d at 255-256. See also United States v. Pecora, 796 F.2d 614, 627-628 (3d Cir. 1986).

In the case at bar, the out-of-court statements allegedly made by Restrepo to Campbell and Dodson consisted primarily of assertions of past facts, the purported seizure of the Petitioner's boat during the Mariel Boatlift. Second, the statements do not appear to have been based upon firsthand knowledge and were uncorroborated by any additional evidence such as evidence which might indicate that a boat match-

ing Restrepo's description had, in fact, been seized. Finally, it was undisputed that Restrepo was starting to use the accounts at the Landmark Bank for his own purposes and, therefore, he had an incentive for prevarication. Had the trial court conducted a separate reliability inquiry, utilizing the criteria set forth in Dutton v. Evans, supra, he might very well have concluded that the statements did not meet the test for admissibility under the Confrontation Clause. The trial court's utilization of the de facto test for admissibility followed in the Eleventh Circuit deprived BOTERO of his constitutional right of confrontation and this Court is urgently requested to issue its writ of certiorari and to take this opportunity to resolve this important and recurring federal question once and for all.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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